Supreme Court, U.S.
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92-1870

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

WOODY VOINCHE
Appellant

v.

UNITED STATES DEPARTMENT OF
THE AIR FORCE
Appellees

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. THE MAIN ISSUE IS THAT WHILE THE DISTRICT COURT, FIFTH CIRCUIT, AND THE AIR FORCE HAVE ALL AGREED THAT THE PLAINTIFF IS A NON-COMMERCIAL REQUESTER, THE AIR FORCE INITIALLY TRIED TO CONFUSE THE ISSUES, INFLATING AND ACTUALLY CHARGING $3000.00 IN COMMERCIAL RATES IN AN ATTEMPT TO CIRCUMVENT ITS STATUTORY AND CASE LAW REQUIREMENTS FOR RELEASING THESE RECORDS. SINCE REDEFINING THE PLAINTIFF AS A NON-COMMERCIAL REQUESTER, NEITHER THE AIR FORCE NOR THE COURTS REASSESSED THIS $3000 COMMERCIAL RATE TO A NON-COMMERCIAL PRICE.

2. IF THE PLAINTIFF IS A NON-COMMERCIAL REQUESTER AND CAN ONLY BE CHARGED FOR SEARCH FEES, THEN BECAUSE THE DIA FOUND THE DOCUMENT IN FOIA REQUEST I AND THE AIR FORCE ADMITTED HAVING IN EXCESS OF 1,000 DOCUMENTS IN THEIR INITIAL CORRESPONDENCE FOR FOIA III, THE AIR FORCE DID NOT HAVE TO SEARCH FOR THESE DOCUMENTS AND THE PLAINTIFF CAN NOT BE CHARGED FOR THESE DOCUMENTS. THE FIFTH CIRCUIT ERRED IN STATING PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES FOR A FEE WAIVER IN REGARD TO THE FIRST AND THIRD FOIA REQUESTS BECAUSE THE PLAINTIFF SHOULD NOT HAVE TO FILE A FEE WAIVER REQUEST FOR DOCUMENTS THAT HE CAN NOT BE CHARGED FOR.

3. THE FIFTH CIRCUIT ADMITTED PLAINTIFF FILED A FEE WAIVER REQUEST FOR FOIA II, BUT CLAIMS, AS THE AIR FORCE DID INITIALLY, THAT PLAINTIFF NEEDED TO BE MORE SPECIFIC IN HIS REQUEST. WAS THE PLAINTIFF'S REQUEST SPECIFIC ENOUGH AND DID THE PLAINTIFF EXHAUST HIS ADMINISTRATIVE REMEDIES?

THE PARTIES

The parties involved in this case are the Plaintiff, Woody Voinche, and the defendants, the Department of the Air Force and the US Attorney's office.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL:

There are no constitutional provisions involved in this case,

STATUTORY:

5 USC 552(a)(4)(A)(ii)

(ii) Such agency regulations shall provide that

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

5 USC 552(a)(6)(A)(i)(ii)

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days(excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days(excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.

If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

5 USC 552(a)(6)(C)

(6)(C) Any person making a request to any agency for records under paragraph(1), (2), or (3) of this subsection shall be deemed to have exhausted his adminisstative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

OPINION BELOW

Magistrate Judge John F. Simon, for the United States District Court for the Western District of Louisiana issues a Memorandum Order, dated June 5, 1991. This has been labeled APPENDIX A. The Ruling of May 13, 1992 of U.S. District Judge, F.A. Little, JR., is set at APPENDIX B. The Judgment filed on May 19, 1992, by Judge Little is at APPENDIX C.

The U.S. Fifth Circuit Court of Appeals entered an Opinion dated, Feb. 18, 1993, as is reported at APPENDIX D.

JURISDICTION

This is an appeal from a final Opinion of the U.S. Court Of Appeals for the Fifth Circuit dated Feb. 18, 1993, and brought forth under the provisions of the Freedom of Information Act.

This Petition is filed within 90 days of the above date and the jurisdiction of this Court is invoked pursuant to 28 USC Section 1254.

STATEMENT OF THE CASE

On Sept. 26, 1990, the Plaintiff-Appellant, Woody Voinche, filed a complaint in Federal District Court for the Western District of Louisiana, against the Department of the Air Force, under the provisions of the Freedom of Information Act(FOIA), 5 USC 552, as amended, to order the production of records.

The Plaintiff filed 3 separate FOIA requests with the Air Force, heretofore, referred to as FOIA Request I, II, III.

For FOIA Request I, the Plaintiff, filed a request with the Defense Intelligence Agency for information "concerning US technology used in the Soviet Space Shuttle." The DIA found 1 document that originated with the Air Force and referred the Plaintiff's request to the Air Force.

For FOIA Request II, the Plaintiff filed an FOIA request with the Air Force for information "concerning USAF Chief General Nathan F. Twining's visit to Soviet aircraft and engine factories and the Soviet's use of Rolls Royce

engines in MIG aircraft and the use of U.S. and German machine tools in these same plants." The Plaintiff used an Aviation Week article to document that the Air Force had records on this subject.

For FOIA Request III, the Plaintiff used a Wall Street Journal, New York Times, and AW&ST article to file a request for information on the (a) Air Force's contract with Grumman Corp. to re-equip Chinese F-8II jet fighters with sophisticated U.S. made cockpit instruments. (b) the Grumman-CATIC Super-7 program and (c) on Hughes Aircraft's proposed co-production of the TOW anti-tank missile with China. The Air Force admitted having over 1,000 documents on the F-8II but denies having documents on the Super-7 or the Hughes-TOW subject.

Three sets of Interrogatories were served on the Air Force and the Plaintiff had to file 3 corresponding Motions To Compel.

Amidst confusion on these issues, the Plaintiff filed a Motion For A Hearing. (Record, p. 84) Judge Little referred the resolution of the

Discovery dispute to Judge John F. Simon. A conference was held in Judge Simon's office on Feb. 14, 1991. Judge Simon issued a Minute Entry(Record, p. 94) where the US Attorney, Mr. John A. Broadwell, would issue a letter(p. 120) clarifying to the Air Force the documents Plaintiff was seeking. Judge Simon further stated the Plaintiff could renew Motions To Compel if the Air Force, then did not provide an appropriate response.

Plaintiff filed a Reconsideration of the Motion to Compel(p. 97) and another motion for the Air Force to produce documents In Camera Review.(Record, p. 104) Judge Simon filed 2 Orders for the Defendants to show why they had not responded.(p. 108-9)

The US Attorney responded(Record, p. 110); the Plaintiff responded to the US Attorney(p. 124) and Judge Simon, then, issued his MEMORANDUM RULING(Record, p. 136) granting the Plaintiff's Motions To Compel and Ordering an "immediate" search for records; provide a description of each document found or state the grounds for exemption.

This Order was issued after it became apparent the Air Force had never searched for the documents or tried to implement the agreement made by the US Attorney and the Plaintiff in the first place.

Representing the Air Force, Captain Marc A. Fox, issued a Declaration(Record, p. 142) on the search conducted and categorized the Plaintiff as a commercial requester. The Plaintiff filed a Motion For Reconsideration For In Camera Review(p. 172) because the Air Force had not followed the Judge's MEMORANDUM RULING in regard to FOIA Request I; a Motion For A Public Interest Fee Waiver and to have the Plaintiff classified as a non-commercial requester(p. 196); And another Motion For A Vaughn Index and to Compel the Answering of Interrogatories, which the Air Force had not yet done.(p. 215)

The Air Force filed Oppositions to these Motions and then filed its Motion For Summary Judgment(p. 239). The Plaintiff filed an Opposition to this Motion For Summary Judgment.(p. 255)

The Judge issued a Minute Entry that Judge

Simon take no action on the Discovery Motions pending Judge Little's action on the Summary Judgment issue. (p. 268) A RULING (APPENDIX B) granting the Defendants' Motion For Summary Judgment was issued. (p. 269) The Plaintiff filed a Notice of Appeal (p. 278) and a JUDGMENT (APPENDIX C) was issued against the Plaintiff denying a Fee Waiver and denying classification of the Plaintiff as a non-commercial requester. (Record, p. 276).

The Plaintiff appealed this Ruling and filed a Brief with the Fifth Circuit Court of Appeals. On Feb. 18, 1993 the Fifth Circuit Affirmed (APPENDIX D) and modified in part, the Ruling of the District Court. The Plaintiff has appealed this Ruling of the Fifth Circuit.

ARGUMENT

1. THE MAIN ISSUE IS THAT WHILE THE DISTRICT COURT, FIFTH CIRCUIT, AND THE AIR FORCE HAVE ALL AGREED THAT THE PLAINTIFF IS A NON-COMMERCIAL REQUESTER, THE AIR FORCE INITIALLY TRIED TO CONFUSE THE ISSUES, INFLATING AND ACTUALLY CHARGING $3000.00 IN COMMERCIAL RATES IN AN ATTEMPT TO CIRCUMVENT ITS STATUTORY AND CASE LAW REQUIREMENTS FOR RELEASING THESE RECORDS. SINCE REDEFINING THE PLAINTIFF AS A NON-COMMERCIAL REQUESTER, NEITHER THE AIR FORCE NOR THE COURTS REASSESSED THIS $3000 COMMERCIAL RATE TO A NON-COMMERCIAL PRICE.

Title 5 USC 552(a)(4)(A)(ii), sets out the statutory requirements for fee charges and categorizing individuals as commercial vs. non-commercial requesters(also Exhibit A, p. 135 of Record) and states,

> (I) fees shall be limited to reasonable standard charges for document search, duplication, and review when records are requested for commercial use;
> (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
> (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

Initially the Air Force classified the Plaintiff as a commercial requester. Mr. Fox stated

in his Declaration,

> Mr. Voinche, not having provided any basis for determining otherwise, must be treated as a commercial requester. (Record, p. 145 and 178)

Prior to this Declaration, the Plaintiff had already proven he was a non-commercial requester (Record, pp. 127-9). Plaintiff also addressed this issue in Plaintiff's Letter A (p. 178-180). The Plaintiff went further and in his Memorandum, Filed, Aug. 28, 1991, stated,

> Plaintiff is attaching to this motion a sworn affidavit that he is seeking these Air Force records for his own use and is not profiting from the sale of these documents. The Plaintiff has sent copies of some of these court documents to the Alexandria TOWN TALK, the Marksville WEEKLY NEWS, a number of other individuals, newsletter writers, and organizations around the country, but he has done so at his own costs...Therefore, he should be classified as a non-commercial requester and cannot be charged for review of documents.' (Record, p. 198)

The US Attorney, then, accepted the Plaintiff's contention that he was a non-commercial requester,

> Based on Mr. Voinche's affidavit attesting that he plans to use the

> requested information for his personal use only, we will accept his contention that he should be considered as a non-commercial requester. If, at some time in the future, however, we come to believe he has put the released information to his commercial use, we would reserve the right to raise this issue with the Court. (Record, p. 225)

The District Court in its Ruling of May 13, 1992, acknowledges that the Air Force does not dispute the Plaintiff's contention that he is a non-commercial requester.

> The Air Force does not dispute plaintiff's contention that he does not intend to use the information for commercial gain,... (Record, p. 270) (APPENDIX B, p. 29)

In the Judgment, Filed, May 19, 1992, the District Court and the US Attorney wrote,

> IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for a public interest fee waiver and request to be classified as a non-commercial requester is DENIED; (Record, p. 276) (APPENDIX C, p. 36)

The Fifth Circuit Court of Appeals agrees that the Air Force and District Court admitted that the Plaintiff was a non-commercial requester.

> We find that Voinche misreads the district court's judgment. The Air Force admitted that Voinche should be considered a non-commercial re-

quester. See Record on Appeal, vol. 2, at 275. In its memorandum opinion on Voinche's motion, the district court noted that the Air Force did not deny that Voinche was a noncommercial requester, but found that Voinche had failed to show that disclosure of the information was in the public interest. (APPENDIX D, footnote 2, p. 42)(Voinche v. U.S. Dept. Of The Air Force, 983 F.2d 667 (5th Cir. 1993) p. 669)

So we see, the Air Force, Dist. Court, and and Fifth Circuit all agree that the Plaintiff is a non-commercial requester. The significance of this is that a non-commercial requester can only be charged for search fees. (5 USC 552 (a)(4)(A)(ii)). The Air Force in assessing over $3,000.00 in fees owed by the Plaintiff(See Tab C of information released by the Air Force) is inflating and confusing the pricing system by trying to charge the Plaintiff for review, excising, etc. As a non-commercial requester the Plaintiff can not be charged for "review" of documents. In addition, the Air Force is further trying to inflate and confuse this pricing system by combining charges for FOIA Request I, II, and III. As the Plaintiff will prove in the next issues discussed, the Plaintiff cannot

be charged for search fees for FOIA Request I and III, because the Air Force never had to search for these documents, but the Air Force is confusing the issue through an error of omission. This is the major issue in this case that has been comouflaged into other issues. The Plaintiff has a right to know exactly what he is being charged for. The Fee Waiver issue which the Fifth Circuit concentrated on, was subsidiary to this issue. And the Air Force is inflating and actually trying to charge commercial rates in an attempt to circumvent its statutory and case law requirements for FOIA, which is in noncompliance with the "general philosophy of full agency disclosure".

> Congress in enacting Freedom of Information Act structured a revision whose stated purpose reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language; congressional objective was to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny. (Department of the Air Force v. Rose, 425 US 352, 96 S.Ct. 1592(1976)

ARGUMENT

2. IF THE PLAINTIFF IS A NON-COMMERCIAL REQUESTER AND CAN ONLY BE CHARGED FOR SEARCH FEES, THEN BECAUSE THE DIA FOUND THE DOCUMENT IN FOIA REQUEST I AND THE AIR FORCE ADMITTED HAVING IN EXCESS OF 1,000 DOCUMENTS IN THEIR INITIAL CORRESPONDENCE FOR FOIA III, THE AIR FORCE DID NOT HAVE TO SEARCH FOR THESE DOCUMENTS AND THE PLAINTIFF CAN NOT BE CHARGED FOR THESE DOCUMENTS. THE FIFTH CIRCUIT ERRED IN STATING PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES FOR A FEE WAIVER IN REGARD TO THE FIRST AND THIRD FOIA REQUESTS BECAUSE THE PLAINTIFF SHOULD NOT HAVE TO FILE A FEE WAIVER REQUEST FOR DOCUMENTS THAT HE CAN NOT BE CHARGED FOR.

The Fifth Circuit Court of Appeals, in its Feb. 18, 1993, Ruling stated,

> *Claimant seeking records from Air Force under Freedom of Information Act(FOIA) failed to exhaust his administrative remedies with respect to fee waiver in connection with his first and third FOIA requests, in view of absence of evidence from record that claimant filed fee waiver request with Air Force(APPENDIX D, p. 38)(Voinche v. US Dept. Of Air Force, 983 F.2d 667(5th Cir. 1993)*

The Fifth Circuit is correct, the Plaintiff did not file Fee Waiver requests for FOIA Requests I and III, but the Plaintiff should not have had to file a Fee Waiver request for records he can not be charged for in the first place.

The Plaintiff has already shown that the Air Force, Dist. Court, and Fifth Circuit have already agreed the Plaintiff is a non-commercial requester. As a non-commercial requester, the Plaintiff can only be charged for search and reproduction fees. (5 USC 552(a)(4)(A)(ii).

For FOIA Request I, the Defense Intelligence Agency(DIA) located the document in question and referred this document back to the originating agency, the Air Force; so the Air Force did not have to search for this document and therefore there should be no charge to the Plaintiff for this document and he would not have to file a Fee Waiver request.

For FOIA Request III, in their initial correspondence, dated, July 20, 1990, the Air Force stated,

> The Acting Deputy Director of Fighters Systems Program Office again advises their office has documentation concerning only the F-8II program. This documentation is voluminous, well in excess of 1,000 documents, and would require substantial review and reproduction efforts to provide all the information they have on the program. (Exhibit III(c)

We again remind the Court, that as a non-

commercial requester the Plaintiff cannot be charged for review of documents and only charged for search and reproduction fees. If the Air Force admitted having "in excess of 1,000 documents" in their initial correspondence, this proves they already knew the location of these documents and there should be no search fees, therefore there would be no reason to file a Fee Waiver request. The Plaintiff has an interest in only about 10 of the documents concerning FOIA Request III and therefore reproduction costs would be minimal. The Air Force needs to quit trying to confuse this issue and give separate and non-commercial prices for FOIA Requests I, II, and III.

ARGUMENT

3. THE FIFTH CIRCUIT ADMITTED PLAINTIFF FILED A FEE WAIVER REQUEST FOR FOIA II, BUT CLAIMS, AS THE AIR FORCE DID INITIALLY, THAT PLAINTIFF NEEDED TO BE MORE SPECIFIC IN HIS REQUEST. WAS THE PLAINTIFF'S REQUEST SPECIFIC ENOUGH AND DID THE PLAINTIFF EXHAUST HIS ADMINISTRATIVE REMEDIES?

The Fifth Circuit in its Ruling of Feb. 18, 1993, (See APPENDIX D, p. 38) stated,

> Claimant seeking records from Air Force under Freedom of Information

Act (FOIA) failed to exhaust his administrative remedies with respect to fee waiver in connection with his second FOIA request, though claimant filed waiver request with Air Force, where Air Force declined to take further action on claimant's FOIA request, because of its broad and nondescript nature, until he was more specific, but instead of amending his second FOIA request, and seeking ruling on his fee waiver, claimant brought judicial action against Air Force.

The Plaintiff believes the Air Force and the Fifth Circuit erred in stating Plaintiff needed to be "more specific" in FOIA Request II. The Plaintiff provided "specific identifying" and documented evidence of the Air Force having made official reports on the subject of FOIA II.

In his initial request letter dated, April 25, 1990, (Exhibit II(c), the Plaintiff attached 2 AVIATION WEEK, articles documenting that USAF Chief Nathan F. Twining made official reports on the subject of the request "Twining's visit to Soviet aircraft and engine factories and the Soviet's use of Rolls Royce engines in MIG aircraft and the use of U.S. and German machine tools in these same plants."

The AVIATION WEEK article of July 2, 1956, p. 29 states,

> The official reports of Gen. Twining and his party will be made to Defense Secretary Charles F. Wilson and President Eisenhower upon their return.

On May 11, 1990, the Plaintiff sent the Air Force an appeal letter(Exhibit II(d), stating,

> Pursuant to 5 USC 552(a)(6)(A)(i)(ii), this is an appeal of your May 1, 1990 response to my FOIA request for information on Soviet's use of Rolls Royce engines in MIG aircraft and use of U.S. and German machine tools in these factories.
>
> I attached several articles documenting that the Air Force had reports and documents on this subject. (See AVIATION WEEK, July 2, 1956, p. 29 on the "official reports of Gen. Twining...")
>
> I am requesting a fee waiver as I believe "the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government"(5 USC 552(a)(4)(A)(i)(ii)(iii) in its regulatory capacity for exports of machine tools, etc. to the USSR. Should you deny this fee waiver, I commit to paying up to $50. for a search of records...

Plaintiff believes this proves he had reasonably described records and adhered to the statu-

tory and case law requirements for identifying records.

> district court could not require environmentalist's request to be in form different from that of any other person requesting information under Act, and only requirements of Act were that request reasonably describe records and comply with agency criteria. (Zemansky v. United States E.P.A., 767 F.2d 569 (9th Cir. 1985) p. 570

The AVIATION WEEK articles attached to the Plaintiff's requests give positive indications of over-looked materials and countervailing evidence for the sufficiency of the agency's retrieval procedure in the form of documentation of Gen. Twining having made official reports on this subject.

> To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act...If the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired materials, the majestic goals of the Act will soon pass beyond reach. And if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory. (Founding Church Of Scientology, Etc. v. Nat. Sec. Agcy., 610 F.2d 365(DC Cir 1979)

The Court in Weisberg writes:

> the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order. (Weisberg v. United States Dept. of Justice, 627 F.2d 365(DC Cir. 1980) p. 370

So, the Plaintiff has shown that he reasonably described the records sought and produced countervailing evidence and documentation of official reports on this subject through Gen. Twining and the AVIATION WEEK articles. After the Plaintiff committed to pay $50. for a search of records and requested a fee waiver as shown in the quotes from his appeal letter; the Air Force switched to the "non-specificity" argument and did not say this amount would not cover the costs or address the fee waiver issue again.

The Plaintiff exhausted his administrative remedies in every way and particularly under 5 USC 552(a)(6)(C),

> Any person making a request ...shall be deemed to have exhausted his administrative remedies...if the agency fails to comply with the applicable time limit provisions...

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

WOODY VOINCHE,
Plaintiff

CIVIL ACTION

versus

NO. CV90-2177-A

UNITED STATES DEPARTMENT OF THE AIR FORCE,
Defendant

JUDGE LITTLE
MAG. JUDGE SIMON

MEMORANDUM ORDER

The Air Force has filed a response to plaintiff, Voinche's, renewal of his motions to compel in this case which he filed on May 10, 1991, and his motion for in camera review which he filed on May 16, 1991. In its response, the Air Force says that it "cannot release any additional documents to Mr. Voinche." This conclusion, and the defendant's lengthy rehash of everything it had presented in its previous responses to the plaintiff's discovery, is redundant and completely irrelevant at this stage of the case.

FOIA Requests Nos. 2 and 3

The defendant's response rehashed its pre-

vious contentions with regard to FOIA Requests Nos. 2 and 3, again stating that the requests have never been denied but that Mr. Voinche was asked to narrow the scope of the requests and/or make financial arrangements to cover costs, both of which he never did.

The last part of this statement is mostly incorrect. In a letter to Tammy K. McDonough dated May 11, 1990, regarding his FOIA Request No. 2(Govt. Ex. P), Mr. Voinche asked for a "fee waiver", and stated that if a "fee waiver" was denied, that he would pay up to $50.00 for a search of records. Additionally, a letter from Sharon Sansone to Mr. Voinche dated July 20, 1990, concerning his FOIA Request No. 3(Govt. Ex. AA) told Mr. Voinche that the Air Force is authorized to charge him for search time and copying as shown on an attached sheet, and Mr. Voinche has persisted in his requests for those materials, which indicates that he is willing to pay whatever the customary charges amount to for information in response to his FOIA Request No. 3.

Additionally, Mr. Voinche and Mr. Broadwell worked together to narrow the scope of the requests and apparently did narrow them.

At the Court's February 14, 1991 conference with the parties, Mr. Broadwell stipulated the following with regard to FOIA Requests Nos. 2 and 3:

> 1. That Mr. Voinche had by then clearly stated what information he sought, but that the Air Force had never searched for the documents.
>
> 2. That Mr. Broadwell's "liaison in Washington", presumably Capt. Marc A. Fox, had agreed with Broadwell that Voinche had identified the documents he was seeking, but asked that such identification be made in writing so that there would not be any misunderstanding.
>
> 3. Mr. Broadwell agreed that he would draw up a list of documents that Mr. Voinche was seeking, based on the material that Mr. Voinche had provided to Mr. Broadwell, and would then send such list to Mr. Voinche for any corrections, additions or deletions.
>
> 4. That after the list was accurate and complete, Mr. Broadwell would send the list of documents to the Air Force and ask them to search for the documents as soon as possible and ask the Air Force to expedite the search,

advising that the Court had given only 60 days to complete the search.

5. Mr. Broadwell agreed that, after the search was made for the specific documents requested, if the Air Force responded that they did not have such documents, or if they had such documents and they would not be made available, that Mr. Broadwell would supplement his previous responses to Mr. Voinche's previous interrogatories, based on the results of the search.

On February 25, 1991, Mr. Broadwell wrote a letter to Capt. Fox specifying the documents that Mr. Broadwell understood were being requested by Mr. Voinche. On March 1, 1991, Mr. Voinche wrote a letter to Mr. Broadwell, which the Court understands was forwarded to Capt. Fox with Mr. Broadwell's letter, in which Mr. Voinche stated that Mr. Broadwell had precisely described the documents or type of documents that Mr. Voinche was seeking.

The law only requires that the documents sought be "reasonably described." 5 U.S.C. 552(a)(3); Zermansky v. US E.P.A., 767 F.2d 569 (9th Cir. 1985). Mr. Broadwell obviously

believed that the documents had been "reasonably described", because that was what he set out to do, and Mr. Voinche agreed with him. This Court is not going to disagree with such a stipulation made by defendant's counsel.

Despite Mr. Broadwell's assurance that the documents that he, himself, had identified, would be searched for, and that a response would be made within 60 days of the date that Mr. Broadwell's letter, supplemented by Mr. Voinche's letter, was submitted to Capt. Fox, such search was never done(See page 3 of the government's response). Instead, the defendant prepared affidavits, dated May 28, 1991, about three months after Capt. Fox received Mr. Broadwell's request in writing, in which two persons who were physically responsible for conducting the searches in question reported on what they had done in December of 1989 and January, May and June of 1990, which was not to make any searches at all.

There is nothing in the materials submitted to the Court to indicate that Capt. Fox did anything whatsoever to implement the agreement of the Air Force, through its attorney, to conduct a search for the documents listed in Mr. Broadwell's letter of February 25, 1991, as approved by Mr. Voinche. Therefore, I will issue an order requiring compliance with that agreement.

FOIA Request No. 1

FOIA Request No. 1 asks for information about U.S. technology used in the Soviet space shuttle. The Air Force had sent Mr. Voinche the title page and one other page of a nine page document on this subject, and declared that the rest of the document was exempt under 5 U.S.C. 552(b)(1) in the interest of national defense.

My minute entry of February 15, 1991, required Mr. Broadwell to seek to obtain information from the Air Force to support its contention that the pages of the document that

were not sent to Mr. Voinche were deleted because providing those pages to Mr. Voinche would endanger national security, and/or provide excerpts from the witheld pages that would not compromise national security. The Air Force failed to send any of this inforration to Mr. Broadwell. The defendant's recent response simply restates that the documents relative to the FOIA Request No. 1 have either been released to Mr. Voinche or withheld because of their classified nature.

Apparently my minute entry of February 15, 1991, was not a form of order which was strong enough to make Air Force personnel understand what they were required to do pursuant to their attorney's agreement. Accordingly,

IT IS NOW ORDERED that the United States Air Force, in compliance with its attorney's agreement, immediately begin a search for the documents described in the letter of February 25, 1991, from John A. Broadwell to Capt. Marc

A. Fox(Govt. Ex. A), and that no later than July 5, 1991, the Air Force provide to Mr. Voinche a description of each document that was found, and state whether a copy of that document will be made available to Mr. Voinche and at what cost to him, if any, or else send a copy of such document to Mr. Voinche. If a copy of the document will not be made available, the Air Force must state the grounds of any asserted exemption from providing the document.

IT IS FURTHER ORDERED that with regard to FOIA Request No. 1, the Air Force must provide information concerning what each undisclosed paragraph of the document previously sent to Mr. Voinche contains, in general terms that would not compromise national security, and state why providing a verbatim copy of each paragraph would compromise national security, and/or provide excerpts from the withheld pages that would not compromise national security, or else submit a copy of the entire document to the undersigned in a sealed envelope for an in

camera inspection, together with a brief(which need not be provided to Mr. Voinche) in support of the Air Force's claims of exemption which specifies the government's contentions as to why providing the deleted portions of the document to Mr. Voinche would compromise national security.

A ruling on Mr. Voinche's request for sanctions under F.R.C.P. Rule 37(b) is deferred until the Court can observe the defendant's compliance with this order.

Mr. Voinche's request for Special Counsel "to determine whether disciplinary action is warranted" in accordance with 5 U.S.C. 552(a)(4)(F) and (G) is premature.

THUS ORDERED AND SIGNED at Alexandria, Louisiana, on this 5 day of June, 1991.

John F. Simon
UNITED STATES MAGISTRATE
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

WOODY VOINCHE

VS

UNITED STATES DEPARTMENT OF THE AIR FORCE

CIVIL ACTION
NO. 90-2177
Section "A"
JUDGE LITTLE

RULING

On 26 September 1990, plaintiff, Woody Voinche, filed a complaint against the United States Department of Air Force alleging that the Air Force failed to respond to three Freedom of Information Act (FOIA) requests that he had previously filed. In his complaint, plaintiff asserts that the Air Force has arbitrarily and capriciously refused to produce certain records or has failed to conduct a reasonable search to locate the requested records. FOIA Request No. 1 seeks documents relative to "U.S. technology used in the Soviet Space Shuttle." FOIA request No. 2 seeks documents related to General Nathan Twining's 1956 visit to aircraft and engine factories in the Soviet Union and information related to the use of Rolls Royce

engine in MIG aircraft. The final FOIA request seeks information pertaining to (1) the United States' agreement with the People's Republic of China to assist in upgrading China's jet fighters; (2) the "Super-7" Program; and (3) and Hughes Aircraft's proposal to co-produce TOW anti-tank missiles with China.

Before this court are two motions. The first is plaintiff's request for a public interest fee waiver and his request to be classified as a non-commercial requester. The second is defendant's motion for summary judgment. Title 5 USC 552(a)(4)(A)(iii) states:

> Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

In order to qualify for a fee waiver, the plaintiff must show that his request is in the public interest and is not for his own personal commercial gain. Attached to the plaintiff's

motion for a fee waiver is his sworn affidavit acknowledging that the information provided by the Air Force will be for his personal use. The Air Force does not dispute plaintiff's contention that he does not intend to use the information for commercial gain, but does dispute plaintiff's assertion that the public interest will be benefitted by disclosure and waiver. "A requester seeking a fee waiver bears the initial burden of identifying the public interest to be served." NTEU v. Griffin, 811 F.2d 644, 647(DC Cir. 1987)(quoting Ely v. United States Postal Service, 753 F.2d 163, 165(DC Cir. 1985), cert denied, 471 US 1106, 105 S.Ct. 2338, 85 L.Ed. 2d 854(1985). "When a public interest is asserted but not identified with reasonable specificity, and circumstances do not clarify the point of the requests, it is not arbitrary or capricious for an agency to infer...that any benefit to the public from the disclosure and waiver 'would be at best, indirect, and

speculative.'" Ely, 753 F.2d at 165. As plain- indicates in his request for a fee waiver, there may be narrow segments of society, e.g. war veterans, military personnel, etc., that certainly may have an interest in the requested subject matter, but this court is unwilling to place the financial burden of plaintiff's voluminous requests on the shoulders of the general public without greater incite into how this information will benefit the public-at-large. Thus, the plaintiff's request for a fee waiver is denied.

The first set of documents requested by the plaintiff concerns "US technology in the Soviet Space Shuttle." In its motion for summary judgment, the Air Force contends that it has thoroughly complied with FOIA request No. 1 and that no additional information can be released pertaining to the request without further revealing classified information that could cause serious damage to the national security interests of the United States. Title

5 USC 552(b)(1)(A) provides:

> (b) This section(FOIA) does not apply to matters that are--
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order...

Captain Ernest Muller of the Foreign Technology Division at Wright-Patterson Air Force Base in Ohio verified in his sworn declaration that the only document in the possession of the Air Force pertaining to request No. 1 was dated 30 September 1988 and entitled "Structural and Material Assessment of the Soviet Shuttle Orbiter." The document has undergone an extensive review and "sanitization" process to remove any classified information that could endanger the national security interests of the United States. In its response to plaintiff's 31 May 1991 motion to compel, defendant has indicated that any other information concerning United States technology used in the Soviet Space Shuttle is classified pursuant to Executive Order 12356, Section 1.3

(a)(1), (2), (3), and (4), and thus falls outside the purview of FOIA.

In his second FOIA request, plaintiff seeks documents pertaining to General Nathan Twining's visit to the Soviet Union in the 1950's, the use of machine tools in a Soviet engine plant, and the Soviet's use of Rolls Royce engines in MIG aircraft. First, as evidenced by the sworn declaration of Sgt. Tammy McDonough, the FOIA Manager for the Air Force Foreign Technology Division, the Air Force conducted an exhaustive search for information related to General Twining's visit. The search revealed that information related to General Twining's visit was no longer in the possession of the Air Force and had been shipped to the Federal Records Center for the General Services Administration in Alexandria, Virginia. Thus, the Air Force is not in violation of FOIA as to this request, because it no longer has custody, control, or possession of the material. See Kissinger v. Reporters Comm for Freedom of the Press, 445 US 136, 100 S.Ct. 96, 63 L.Ed.

.2d 267 (1980). Plaintiff can now direct his request for information regarding the Twining visit to the General Services Administration.

Of the 1,742 entries related to FOIA request No. 2 that were located through the Central Information Control and Reference intelligence data base, 1,104 of those were considered unclassified and even fewer were directly related to plaintiff's requests. The Air Force argues that the cost to plaintiff to retrieve and review this information will be tremendous. Now that this court has determined that plaintiff does not qualify for a fee waiver, it becomes the responsibility of the plaintiff either to amend or alter his request or to pay the attendant costs of such a search.

In his third and final FOIA request, plaintiff seeks information related to assistance provided by the United States to the People's Republic of China in upgrading China's F-811 fighter aircraft. The Air Force has again sufficiently demonstrated that they have complied with the request by providing the plaintiff

with the Grumman Corporation contract as well as documents pertaining to the suspension of the upgrade program as a result of the Tian-amen Square uprising in 1989.

Additional documents sought by Voinche related to the Super-7 program and Hughes Aircrafts' proposal to co-produce TOW anti-tank missiles. They are not within the possession of the Air Force. Virginia Brown, the Foreign Military Sales Manager for the Directorate of Fighter Missiles, Systems Program Office at Wright-Patterson Air Force Base, concluded in her sworn declaration the the Department of the Air Force was not responsible for either the Super-7 Program or the Hughes Aircraft proposal, and thus did not have any information related to either of these subjects. As previously stated, the Air Force cannot violate FOIA when the documents requested are not within its possession, custody or control. Kissinger, 445 US 136.

Rule 56 states that summary judgment is appropriate if there is "no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. A mere scintilla of evidence will not defeat a motion for summary judgment; there must be sufficient evidence which "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 US 242, 248(1986); see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 US 574, 586-87(1986) (summary judgment is appropriate even if "there is some metaphysical doubt as the material fact").

Based on the foregoing conclusions of law, the defendant's motion for summary judgment is GRANTED and all plaintiff's claims against the defendant's are DISMISSED with prejudice. Costs are to be borne by the plaintiff. Defendant is directed to prepare and submit a judgment to this court within 20 days from the date of this ruling.

Alexandria, Louisiana.

13 May 1992.

F.A. LITTLE, JR.
US DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

WOODY VOINCHE

versus

UNITED STATES DEPARTMENT
OF THE AIR FORCE

CIVIL ACTION NO.
90-2177

JUDGE LITTLE

JUDGMENT

For the written reasons assigned by the Court and filed on May 13, 1992,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for a public interest for waiver and request to be classified as a non-commercial requester is DENIED; that defendant's motion for summary judgment is GRANTED; and that all plaintiff's claims against the defendant are dismissed with prejudice at plaintiff's cost.

THUS DONE AND SIGNED in Alexandria, Louisiana, on this 19 day of May, 1992.

F. A. LITTLE, JR.
United States District
Judge

APPENDIX C

WOODY VOINCHE, PLAINTIFF-APPELLANT,

V.

UNITED STATES DEPARTMENT OF THE AIR FORCE, DEFENDANT-APPELLEE

NO. 92-4551
Summary Calendar

United States Court of Appeals
Fifth Circuit

Feb. 18, 1993

Claimant filed action against the Department of the Air Force, claiming it had violated provisions of the Freedom of Information Act(FOIA) by providing inadequate responses to three independent requests for information. The United States District Court for the Western District of Louisiana, F.A. Little, Jr., J., denied claimant's request for public interest fee waiver, and claimant appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that claimant seeking fee waiver under FOIA had to exhaust his administrative remedies prior to seeking judicial relief.

Modified in part, and affirmed.

1. Records © 68

Claimants seeking fee waiver under Freedom

of Information Act(FOIA) must exhaust their administrative remedies prior to seeking judicial relief. 5 USCA 552(a)(4)(A)(vii).

2. Records © 68

Claimant seeking records from Air Force under Freedom of Information Act(FOIA) failed to exhaust his administrative remedies with respect to fee waiver in connection with his first and third FOIA requests, in view of absence of evidence from record that claimant filed fee waiver request with Air Force. 5 USCA 552(a)(4)(A)(vii).

3 Records © 68

Claimant seeking records from Air Force under Freedom of Information Act(FOIA) failed to exhaust his administrative remedies with respect to fee waiver in connection with his second FOIA request, though claimant filed waiver request with Air Force, where Air Force declined to take further action on claimant's FOIA request, because of its broad and nondescript nature, until he was more specific, but instead of amending his second FOIA request, and seeking ruling on his fee waiver, claimant

brought judicial action against Air Force. 5 USCA 552(a)(4)(A)(viii).

4. Records @ 62

Purpose of "Vaughn index" in Freedom of Information Act(FOIA) matter, is to justify agency's withholding of documents by correlating each document with particular FOIA exemption. 5 USCA 552.

5. Records @ 63

Claimant's arguments that Air Force should be required to produce Vaughn index and to answer interrogatories pertaining to claimant's Freedom of Information Act(FOIA) requests, raised on appeal from district court's denial of motion for fee waiver under FOIA, were rendered moot by determination that claimant had to exhaust his administrative remedies with respect to fee waiver request, where claimant did not appeal summary judgment entered in favor of Air Force. 5 USCA 552.

Appeal from the United States District Court For the Western District of Louisiana.

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Woodu Voinche appeals from the district court's denial of his motion for a fee waiver under the Freedom of Information Act("FOIA"), 5 USC 552(1988). Because Voinche failed to exhaust his administrative remedies with respect to the fee waiver, we decline to address the merits of his claim, and modify the district court judgment so that the fee waiver request is dismissed without prejudice. Voinche also requests that we rule on his motion for an index of documents withheld and to compel the answering of interrogatories. We decline to do so because the issues presented in the motion are moot. Accordingly, we affirm the district court judgment as modified.

I.

Voinche filed an action against the Air Force, claiming that it had violated provisions of the FOIA by providing inadequate responses to three independent requests for information. While his suit was pending, Voinche filed a Motion for Public Interest Fee Waiver and Ruling for

Classification of Plaintiff as a Non-Commercial Requester.[1] The district court denied Voinche's motion for a public interest fee waiver as to certain documents that the Air Force agreed to produce because Voinche had failed to show that disclosure of the information was in the public interest. Voinche also filed a Motion for Vaughn Index and to Compel the Answering of Interrogatories. Before the district court ruled on Voinche's motion, the Air Force moved for summary judgment, claiming that it had fully complied with Voinche's requests by providing all available information that was not restricted due to national security interests. As a result, a United States magistrate judge, pursuant to the district court's request, delayed disposition of Voinche's motion, pending the district court's decision on the Air Force's motion for summary judgment. See Record on Appeal, vol. ?, at ?68.

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1. Voinche requested a fee waiver for the search, review, and reproduction costs associated with his three FOIA requests.

The district court granted the Air Force's motion for summary judgment, and dismissed Voinche's claims with prejudice. The district court never ruled on Voinche's motion for a Vaughn index and to compel the answering of interrogatories.

II.

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Voinche alleges that he was entitled to a fee waiver because he established that disclosure of the information was in the public interest,[2] as

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2. Voinche also argues that the district court erroneously classified him as a commercial requester in denying his motion for a public interest fee waiver. In order to qualify for a fee waiver, a claimant must show that disclosure of the information is in the public interest, and that disclosure is not primarily for the claimant's own commercial interest. See 5 USC 552 (a)(4)(A)(iii)(1988).

We find that Voinche misreads the district court's judgment. The Air Force admitted that Voinche should be considered a non-commercial requester. See Record on Appeal, vol. 2, at 275. In its memorandum opinion on Voinche's motion, the district court noted that the Air Force did not deny that Voinche was a noncommercial requester, but found that Voinche had failed to show that disclosure of the information was in the public interest. See id. at 270. It is clear that the district court did not deny Voinche's request to be classified as a non-commercial requester. Rather, the district court denied Voinche's motion for a fee waiver because he failed to show that disclosure was in the pub-

required under 5 USC 552(a)(4)(A)(iii)(1988).[3]

(1) In discussing two other FOIA provisions, 5 USC 552(a)(4)(B), (a)(6)(C)(1988), this Court in HEDLEY V. UNITED STATES, 594 F2d 1043(5th Cir. 1979), stated:

> Although these sections do not expressly require that a claimant exhaust his administrative remedies prior to requesting judicial relief, they clearly do imply that exhaustion is required. Exhaustion of administrative remedies is a general prerequisite to judicial review of any administrative action. We conclude that the FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review.

Id. at 1044(citations omitted). Our holding in Hedley--that FOIA requires exhaustion of admin-

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lic interest. Therefore, Voinche's argument is without merit.

3. Section 552(a)(4)(A)(iii) provides:

> Documents shall be furnished without any charge or at a charge reduced below the fees established under clause(ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

istrative remedies--need not be limited to sections 552(a)(4)(B), (a)(6)(C). Like those sections, section 552(a)(4)(A), the FOIA provision discussing fee waivers, does not expressly require claimants to exhaust their administrative remedies before seeking judicial relief. However, section 552(a)(4)(A)(vii) implies that exhaustion is required: "In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency." 5 USC 552(a)(4)(A)(vii) (1988). Accordingly, we hold that claimants seeking a fee waiver under FOIA must exhaust their administrative remedies prior to seeking judicial relief.[4]

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4. See AFGHE, Local 2782 v. United States Dep't of Commerce, 907 F.2d 203, 206, 209, (DC Cir. 1990). In AFGHE, the claimants' requests for documents under the FOIA were denied by the Census Bureau. Id. at 209. The claimants brought a judicial action against the Census Bureau, seeking to compel the production of the documents. Id. at 206. The claimants filed with the district court a motion for a fee waiver

(2, 3) Voinche has not alleged that he exhausted his administrative remedies, nor does the record contain evidence that he did so. [5] *Therefore, we decline to address the merits of Voinche's claims. Furthermore, because Voinche's motion for a fee waiver was not properly before the district court, we vacate the district court order denying Voinche's fee waiver request.*

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which the district court denied. Id. The claimants appealed the denial of the motion, arguing that the fee waiver was required because it was in the public interest. Id. at 209. The court on appeal refused to address the issue of waiver because the claimants had failed to exhaust their administrative remedies as required under the FOIA. See id. The court stated:

> *As a general proposition, 'a party seeking review of agency action(must) exhaust its administrative remedies before seeking judicial review.' We have specifically held that '(e)xhaustion of (administrative) remedies is required under the Freedom of Information Act before a party can seek judicial review.' Moreover, the FOIA specifically provides that judicial review of a decision regarding waiver of fees, although de novo in the district court, 'shall be limited to the record before the agency.' Since that record does not include a request to waive the search fee required by the Bureau, we decline to consider the appellant's claimed entitlement thereto.*

Id. (citations omitted).

5. With respect to Voinche's first and third FOIA requests, the record contains no evidence

(4, 5) Voinche also argues that we should require the Air Force to produce a Vaughn index[6] and to answer interrogatories pertaining to Voinche's FOIA requests. Voinche seeks also to

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that Voinche filed a fee waiver request with the Air Force. As a result, Voinche has failed to exhaust his administrative remedies with regard to his first and third FOIA requests. Voinche did request that fees be waived for his second FOIA request, however. See Record on Appeal, vol. 1, at 144. Thus, the issue is whether Voinche exhausted his administrative remedies by requesting a fee waiver for the attendant costs of his second FOIA request.

In his second request, Voinche asked for "a list of documents(the Air Force has) on British, US, and German machine tools and engine-aircraft technology used and incorporated into Soviet aircraft." See id. at 39. Under Air Force regulations, "'(a) requester must be reasonably specific identifying each record sought. Sufficient data must be given to help find the records in a way that doesn't involve an unreasonable amount of effort. The Air Force isn't required to let requesters browse through entire files or large series of records to find a record that they then 'identify.'" Id. at 43. Because Voinche requested information of a very broad (the Air Force located 1,724 related entries, see Record on Appeal, vol. 2, at 273) and nondescript nature, the Air Force did not rule on Voinche's request for a fee waiver, but instead asked Voinche to be more specific in his second FOIA request, pursuant to Air Force regulations. See Record on Appeal, vol. 1, at 36, 43, 46. The Air Force stated that it would take no further action until Voinche did so. Instead of

compel the Air Force to answer interrogatories pertaining to the Air Force's response to his FOIA requests. Because Voinche does not appeal the summary judgment in favor of the Air Force, these issues are moot. See Rocky v. King, 900 F.2d 864, 866(5th Cir. 1990)("The mootness doctrine requires that the controversy posed by the plaintiff's complaint be 'live' not only at the time the plaintiff files the complaint but also throughout the litigation process.").

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amending his second FOIA request, Voinche brought a judicial action against the Air Force. Because Voinche could have amended his second request, and could have sought a ruling on his fee waiver request after doing so, Voinche failed to exhaust his administrative remedies with regard to his second FOIA request. Cf. Rhodes v. United States, 574 F.2d 1179(5th Cir. 1978)(holding that plaintiff had failed to exhaust administrative remedies where Secretary of the Army had not yet ruled upon adverse decision of the Army Claims Service).

6. The purpose of a Vaughn index is to justify an agency's withholding of documents by correlating each document with a particular FOIA exemption. See Vaughn v. Rosen, 484 F2d 820(DC Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974); Knight v. United States CIA, 872 F.2d 660, 661-62(5th Cir. 1989), cert. denied, 494 U.S 1004, 110 S. Ct. 1296, 108 L.Ed.2d 474 (1990).

III

For the foregoing reasons, the district court judgment is MODIFIED so that Voinche's fee waiver request is dismissed without prejudice; in all other respects, the judgment is AFFIRMED.

CERTIFICATE

I certify that 40 copies of the above and foregoing Petition has been sent to the Clerk of the Supreme Court and 3 copies to the US Attorney by placing same in the U.S. Mails and properly addressed this 12th day of May, 1993. Marksville Louisiana 71351

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